



## May Case Law Update May 31, 2017

### A summary of Wisconsin court opinions decided during the month of May related to planning

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### ***United States Supreme Court Opinions***

[The April Case Law Update summarized the May 1<sup>st</sup> [Bank of America v. City of Miami](#) decision allowing cities to sue banks under the Federal Fair Housing Act for predatory lending practices. Please refer to last month's Update in case you missed it.]

### ***Wisconsin Supreme Court Opinions***

#### **Local Discretion Upheld in Granting Conditional Use Permits**

The case, [AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee](#), 2017 WI 52, involved a proposed 265-acre silica sand mine in the Town of Arcadia in Trempealeau County. Land use in the Town falls under the County's zoning ordinance. The proposed mine would be located in an agricultural zoning district. Non-metallic mining is a conditional use within the district. AllEnergy applied for a conditional use permit shortly before the County imposed a temporary moratorium on new non-metallic mining activities. Following a public hearing on the permit, the County Environment & Land Use Committee voted seven-to-one to adopt 37 conditions for the mine but then immediately voted five-to-three to deny the permit based largely on the concerns raised at the public hearing about the potential negative impacts of the proposed mine on public health, public safety, and the aesthetics of the area.

All Energy appealed the Committee's decision to the circuit court. The circuit court upheld the Committee's decisions. AllEnergy then appealed the circuit court decision to the Wisconsin Court of Appeals. In an unpublished decision, the Wisconsin Court of Appeals affirmed a circuit court order upholding Trempealeau County's action. AllEnergy then petitioned the Wisconsin Supreme Court to review the decision. The Wisconsin Supreme Court accepted the case for review.

A divided Wisconsin Supreme Court voted 4-3 to affirm the decision of the Court of Appeals upholding the County's denial of the conditional use permit. Justice Shirley Abrahamson wrote the "lead opinion" affirming the County's action. (A "lead opinion" is an opinion that states the decision of a majority of justices but represents the reasoning of less than a majority of the participating justices). Justice Ann Walsh Bradley joined Justice Abrahamson in her opinion.

Justice Annette Ziegler wrote a concurring opinion agreeing with the outcome but not agreeing with the reasoning of Justice Abrahamson. Chief Justice Patience Roggensack joined with Justice Ziegler in her concurring opinion. Justice Daniel Kelly wrote a dissenting opinion and was joined by Justices Michael Gableman and Rebecca Bradley. *The absence of a majority opinion, however, makes the reasoning articulated in the three opinions very insightful, as discussed below.*

AllEnergy appeal presented the Supreme Court with three issues:

- I. Did the Trempealeau County Environment & Land Use Committee, an appointed body without the power to legislate, exceed its jurisdiction by denying a conditional use permit based on broad legislative concerns over the public health, safety, and welfare?
- II. Did substantial evidence in the administrative record support the denial of a conditional use permit for non-metallic mining?
- III. Should the court adopt a new doctrine that a conditional use permit applicant is entitled to the permit where (A) all ordinance conditions and standards are met and (B) additional conditions can be adopted that address potentially-adverse impacts from the use?

The lead opinion and the dissenting opinion present two different ways of looking at conditional uses. The lead opinion presents the first issue, regarding the jurisdiction of the Committee, as a delegation of authority issue. The lead opinion states that the Court needs to consider whether the applicable ordinance granted the County's Environment & Land Use Committee with the authority to take the action it took. The lead opinion cites the language in the county ordinance listing numerous factors to guide the Committee's action including directing the Committee to determine that the proposed use "will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area." The lead opinion cites prior Wisconsin case law declaring that generalized standards in zoning ordinances for conditional uses are acceptable. The lead opinion cites other Wisconsin case law upholding the authority of local ordinances to delegate discretionary authority to various boards, commissions, and committees. The lead opinion then quotes from the record the reasons the five Committee members articulated for denying the permit based on the factors listed in the ordinance and concludes that the Committee kept within its jurisdiction.

According to the lead opinion, "[i]n Wisconsin, and in many states, a conditional use is one that has been legislatively determined to be compatible in a particular area, not a use that is always compatible at a specific site within that area. In these states, the decision whether to grant a conditional use permit is discretionary. The relevant entity determines whether a particular site will accommodate a proposed particular use. In other states, decision makers have less discretion on requests for a conditional use permit."

The dissenting opinion takes the view that local governments have less discretion and concludes that the Committee exceeded its jurisdiction. According to the dissent, the jurisdiction of the Committee is limited to determining the appropriate conditions to control for the potentially hazardous aspects of the proposed mine. The dissent states that the “Committee exceeded its jurisdiction when it took upon itself the task of determining whether a sand mine, as a general proposition, is an appropriate use of the AllEnergy property.”

The dissent cites several land use law treatises and several Wisconsin cases that discuss the distinctions between permitted uses and conditional uses in zoning. While conditional uses are not uses allowed as a matter of right, as in the case of permitted uses, conditional uses provide site-specific discretionary review of proposed uses that are generally deemed compatible or desirable in a particular zoning district. A conditional use designation did not give the Committee “free rein to deny an application.”

According to the dissent, “[w]hen the Trempealeau County Board writes its zoning code, or considers amendments, the testimony it needs, and is appropriate to consider, is whether a type of use is compatible with a designated zoning district. This is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property.”

Examining the language of the County’s zoning ordinance the dissent concludes that the Trempealeau County Board had legislatively determined that sand mining is not inherently inconsistent with the agricultural zoning district for the property. “An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance.”

The dissenting opinion illustrates its point with the following scenario: “if an ice-cream shop is a conditional use, a land-use committee may not deny a permit because the committee’s members object to the owner selling ice-cream on his property. Such objections are in order when the municipality adopts (or amends) its zoning ordinance and considers which conditional uses (if any) to include in each of its zoning districts. Upon adding a conditional use to a zoning district, the municipality rejects, by that very act, the argument that the listed use is incompatible with the district.”

As to the second issue, regarding the sufficiency of the evidence, the lead opinion notes that local decisions are entitled to a presumption of correctness and validity. The Court only considers whether the Committee made a reasonable decision based on the evidence before it. According to the lead opinion, public expression of support or opposition can establish the substantial evidence needed to support decisions on conditional use permits. The lead opinion cites the public testimony presented to the Committee related to environmental impacts, health concerns, and aesthetics. AllEnergy contended that it presented expert testimony responding to these concerns but the lead opinion stated that it was not the role of the Court to re-weigh the evidence.

The dissent acknowledges that the testimony and concerns expressed at the public hearing were valid, but the dissent opines that these concerns should have been raised at the time the County developed its zoning ordinance. “Once the County adopts its zoning code, however, testimony about a proposed use has a narrower function.” According to the dissenting opinion, the testimony should be used by the Committee to help “determine what specific standards AllEnergy would be required to satisfy before obtaining a sand mining permit.” Here the dissent concluded the testimony was used to address a question already answered by the County Board – whether it would be advisable to operate a sand mine in the district.

On the final issue, AllEnergy argues that the Court should adopt a new doctrine followed in other states whereby if an applicant satisfies all the conditions in the ordinance (and those conditions cannot be based on subjective generalized standards), then the applicant has a right to the conditional use permit. The lead opinion, however, found that AllEnergy failed to provide a compelling reason for the Court to depart from long-standing precedent that allows local governments to determine whether a proposed conditional use is compatible for a specific site.

The dissent is more receptive to the new doctrine advocated by AllEnergy. The dissent would require more specific standards than found in the County’s ordinance. According to the dissent, vague “public interest” standards force “permit applicants to play the ‘guess what’s in my head’ game with the Committee.” The dissent would have remanded the case to have the Committee to engage with the specifics of AllEnergy’s proposal and determine whether appropriate conditions would protect against the hazards of the proposed mine.

While the concurring opinion agrees with the validity of the County’s action, the concurring opinion is not able to join the lead opinion, because the lead opinion examines issues that are not necessary to the case. The concurring opinion believes that the lead opinion and the dissent make the case “much more complicated and potentially more far-reaching in effect than it should be.” The concurring opinion agrees that the County’s decision is entitled to a presumption of correctness and validity. According to the concurring opinion, the Committee kept within its jurisdiction and the legitimate environmental and health concerns, among others, supported the Committee’s decision to deny the permit. For the concurring justices, these type of decisions involve “local concerns” best handled at the local level.

The approach advocated by AllEnergy and accepted by the dissenting opinion would force many communities to reexamine the specificity of the standards for conditional uses and would likely result in many communities limiting what they consider a conditional use. If communities wanted to allow large scale sand mining, they might be prompted to develop standards for an industrial zoning classification in which frac sand mines would be a permitted use. Under the facts of this case, that would push the debate about the appropriateness of frac sand mines to the rezoning process rather than the conditional use permit process.

None of the three Supreme Court opinions in the case discuss the role of the local comprehensive plan in helping to provide guidance for whether a proposed conditional use

might be contrary to the “public interest.” Many local government zoning ordinances use compatibility with the local comprehensive plan as a standard for reviewing applications for conditional use permits. While this is still an acceptable standard that local governments can use, 2015 Wis. Act 391 clarified that state law does not mandate that local governments must use it as a standard.

## ***Wisconsin Court of Appeals Opinions***

### **Certiorari is Appropriate Standard for Reviewing TIF Challenge**

[Voters With Facts v. City of Eau Claire](#) involved a lawsuit brought by a group of concerned citizens and others challenging the use of tax increment financing (TIF) for the “Confluence Project,” a new performing arts center and residential development on a riverfront site in downtown Eau Claire. In particular, the citizens challenged the “blight” and “but for” determinations made by the various bodies involved with approving two tax increment districts (TIDs) for the project. These are two prerequisites to the use of tax increment financing under Wisconsin state statutes.

The challengers to the City’s actions sought a declaratory judgment by the court that the City failed to follow the statutory requirements in approving the TIDs and a common law certiorari action that the City’s actions were arbitrary, capricious, and outside the scope of the City’s legal authority. The City moved to dismiss the action and the circuit court granted the dismissal. The challengers then appealed the circuit court decision to the Wisconsin Court of Appeals. The Court of Appeals upheld the circuit court’s dismissal of the declaratory judgment action but reversed the circuit court’s decision dismissing the common law certiorari action.

According to the Court of Appeals, under the TIF statutes, the “blight” determination and “but for” requirement are procedural requirements, not substantive rules. In other words, state statutes only require that a city or village assert that an area is blighted. They do not require that the city or village prove that the area is in fact blighted. As a result, the “blight” determination and “but for” are matters of legislative discretion and therefore not subject to judicial review as a matter of declaratory judgment (a court declaring that the city/village did not follow the statutes).

Nevertheless, the Court of Appeals determined that a court may review the City’s actions by way of common law certiorari review. Common law certiorari review is “on the record review” in which a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision. Based on this record, a court’s review is limited to four inquiries: (1) whether the municipality kept within its jurisdiction; (2) whether the municipality proceeded on a correct theory of law; (3) whether the municipality’s decision was arbitrary, oppressive, or unreasonable and represented the municipality’s will and not its judgment; and (4) whether the evidence was such that the municipality might reasonably make the determination in question.

An issue for the challengers was whether the project costs for the TIDs included the costs for the demolition of several buildings that were listed on the National Register of Historic Places -- a project cost that is forbidden under Wisconsin’s TIF statutes.

The Court of Appeals remanded the case to the circuit court for further proceedings under certiorari review of the challengers’ allegations that the City lacked substantial evidence to make the “blight” and

“but for” determinations to create the TIDs at issue and that those actions were done arbitrarily. This will allow the courts to review the record developed by the City supporting the use of TIF and look at the reasonableness of the City’s actions approving the TID.

The decision is recommended for publication.

### ***U.S. Court of Appeals for the 7<sup>th</sup> Circuit Opinions***

[No planning-related cases to report.]